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SUPREME COURT, U.S.

No. 79-6370

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

ALBERT ABLE and BETTY ABLE

vs.

STATE OF DELAWARE

On Appeal From The Supreme Court of Delaware

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF FACTS	3
THE QUESTION, POSING A CHALLENGE IDENTICAL TO THAT IN DOE V. DELAWARE, No. 79-5932 PROBABLE JURISDICTION NOTED, 48 U.S.L.W. 3613 (U.S. MARCH 24, 1980), IS SUBSTANTIAL	7
THE DELAWARE TPR STATUTE IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE	7
CONCLUSION	11

TABLE OF AUTHORITIES

Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F. 2d 1137 (8th Cir. 1976)	8
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	7
Davis v. Smith, 583 S.W. 2d 37 (Ark. 1979)	9
Duchesne v. Sugarman, 566 F. 2d 817 (2nd Cir. 1977)	7
Giaccio v. Pennsylvania, 382 U.S. 399 (1966)	8
In Re Five Minor Children, 407 A. 2d 198 (1979) prob. juris. noted sub nom., Doe v. Delaware, No. 79-5932 48 U.S.L.W. 3613 (U.S. March 24, 1980)	6
In Re William L., 383 A. 2d 1228 (Pa. 1978)	3
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968)	8
Meyer v. Nebraska, 262 U.S. 390 (1923)	7
Moore v. East Cleveland, 431 U.S. 494 (1977)	7

	Page
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	7
Prince v. Massachusetts, 321 U.S. 158 (1944)	7
Quilloin v. Walcott, 434 U.S. 246 (1978)	7
Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976)	8
Smith v. Goguen, 415 U.S. 566 (1974)	8
Stanley v. Illinois, 405 U.S. 645 (1972)	7
Wisconsin v. Yoder, 406 U.S. 205 (1972)	7

CONSTITUTION, STATUTES AND RULES

Constitution of the United States:	
Fourteenth Amendement	2
Delaware Code, Chapter 13:	
Section 1103(4)	passim
Section 1105(c)	4
Section 1107	4
Section 1112	3
28 U.S.C. §1257(2)	2
Delaware Supreme Court Rule 19	2
United States Supreme Court Rule 10(3)	2

ARTICLES

Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale, 16 J. Fam. L. 213 (1977-78)	9
Due Process and the Fundamental Right to Family Integrity: A Re-evaluation of South Dakota's Parental Termination Statute, 24 So. Dak. L. R. 447 (1979)	9
Note, The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings, 68 Geo. L. J. 213 (1980)	9

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No. _____

ALBERT ABLE and BETTY ABLE

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On Appeal From the Supreme Court of Delaware

JURISDICTIONAL STATEMENT

Appellants Albert Able and Betty Able appeal from the judgment of the Supreme Court of Delaware entered January 8, 1980 affirming the permanent termination of their relationship with their four children.

OPINIONS BELOW

The per curiam opinion of the Supreme Court of Delaware, dated January 7, 1980, is attached to this jurisdictional statement as Appendix A. Prior opinions in the same proceeding include an oral opinion of the Superior Court, delivered August 23, 1977, and a final order of judgment of the Superior Court dated May 31, 1978, which are attached, respectively, as Appendices B and C. None of the three opinions is officially reported.

JURISDICTION

The proceedings below were commenced in the Delaware Superior Court pursuant to 13 Del. C. §§1101-13 to terminate Appellants' parental rights in their four minor children. Following the opinion of the Delaware Supreme Court entered on January 8, 1980 (Appendix A), the Clerk of that Court entered a final judgment and mandate on January 29, 1980 (Appendix D).* A notice of appeal in this case was filed in the Delaware Supreme Court on April 3, 1980, and is attached as Appendix E.** Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the provisions of 13 Del. Code §§1101-13 are set forth in Appendix F.

QUESTION PRESENTED

Is the Delaware statute, which provides for the permanent termination of the parent-child relationship where the parent is "not fitted," unconstitutionally vague and indefinite in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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* Under Delaware Supreme Court Rule 19, a final judgment issues 15 days after the entry of an opinion.

** A notice of appeal in identical form, also attached as Appendix E, was filed in the Delaware Superior Court on April 2, 1980, in the event that that Court should now be deemed the Court "possessed of the record." Sup. Ct. R. 10(3).

STATEMENT OF FACTS

Delaware, like many other states, provides a statutory procedure for termination of the parent-child relationship, commonly known as a "TPR" proceeding.* The TPR remedy is different from, and far more drastic than, a custody proceeding that transfers control of the child on a temporary or indefinite basis. The TPR remedy, by contrast, permanently terminates all legal rights of the parent or parents affected. In practical terms, it excludes the parent or parents from any further contact or relationship with the child, regardless of improvement or rehabilitation of the parent. When parental rights are terminated the "child is dead so far as the parent is concerned". In Re William L., 383 A. 2d 1228, 1252 (Pa.) (Manderino J., dissenting) cert. denied 439 U.S. 880 (1978) cf. 13 Del. C. §1112 ["..as if the child and the person or persons whose parental rights have been terminated were and always had been strangers."].

On August 13, 1976, the Division of Social Services of the Delaware Department of Health and Social Services (the "Division") filed a TPR petition in the Delaware Superior Court against ALBERT ABLE and BETTY ABLE, the natural married parents of four children whose ages then ranged from 20 months to seven

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* "TPR" is an acronym for "termination of parental rights." 13 Del. C. §§1101-13. The entire chapter is reprinted in Appendix F.

years. The statutory "ground" asserted in the TPR petition was that set forth in 13 Del. Code §1103(4), which reads in its entirety:

> "The parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights."*

Nothing in the statute provides any further guidance -- by definition, requirement, standards or otherwise -- as to what constitutes unfitness under this provision.

On August 22, 1977, the TPR petition was heard in the Superior Court. The Division, through the testimony of several social workers, spoke of their contacts with the Ables and their children. In response, the Ables presented the testimony of Dr. D__, a psychiatrist who had been counseling the Ables on a weekly basis since May, 1976. Dr. D__ testified that he saw no reason why the Ables could not in the near future provide adequate care for the children and assume parental responsibilities.

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* The TPR petition served upon the parents pursuant to 13 Del. Code §1107 did not indicate what activities rendered them unfit. Although the Division filed a narrative social report in the Superior Court pursuant to 13 Del. Code §1105(c), such was not served with the petition. In fact, the Division refused to produce the report for the parents' inspection in the absence of a court order.

At the conclusion of the trial the trial judge delivered his oral findings and order.* He found that, as of March, 1976, the Ables were unfit because (1) Fred, then eighteen months, was unable to walk, preferred a bottle, and experienced difficulty speaking, (2) Candy, then six years old, had difficulty sleeping and threw food and (3) Elizabeth was not receptive to communications and control.** A. 2b. However, relying on Dr. D__, "the true professional in the case" (A. 4b), he continued the case for six months and asked Dr. D__ to report in six months concerning "the present condition of the [Ables] in handling their children." A. 4b. Dr. D__ did so, indicating he believed that the parents' progress enabled them to presently care for two of their children.

The Superior Court reconvened the hearing in April, 1978, and heard not only from Dr. D__ but from a psychiatrist produced by the Division. The two psychiatrists offered conflicting views about the parents' abilities. After post-hearing briefing***, the trial judge issued a written opinion. Finding that the parents' "dependency needs" were

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* No finding was made concerning Dorothy.

** The trial judge prefaced his remarks by stating:

> "Gentlemen, it is unfortunate that many times the person who has to decide cases such as this are always influenced by their own personal backgrounds, but that's the case. I guess maybe that's something that's built into justice.
>
> Being an Italian, I'm a firm believer that a strong family can take on the world and survive." A. 2b.

*** In that briefing, the Appellants reiterated their vagueness challenge to 13 Del. C. §1103(4).

"still so great" (A. 1c), he held that it would be in the best interests of the children to sever their relationship with their parents.

On appeal the Delaware Supreme Court, by per curiam opinion, affirmed. Relying on its recent holding in In Re Five Minor Children, 407 A. 2d 198 (1979) [prob. juris. noted sub nom., Doe v. Delaware, 48 U.S.L.W. 3613 (U.S. March 24, 1980)], the Court rejected the Appellants' vagueness attack on 13 Del. Code §1103(4). A. 3a.

THE QUESTION, POSING A CHALLENGE IDENTICAL TO THAT IN DOE V. DELAWARE, NO. 79-5932 PROBABLE JURISDICTION NOTED, 48 U.S.L.W. 3613 (U.S. MARCH 24, 1980), IS SUBSTANTIAL

THE DELAWARE TPR STATUTE IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

Rejecting the Appellants' challenge, the Delaware Supreme Court sustained the "fitness" provision of 13 Del. Code §1103(4) against charges of unconstitutional vagueness. Whether that statute satisfies due process requirements is a substantial constitutional question involving rights and relationships of the most fundamental nature. Indeed, in Doe v. Delaware, No. 79-5932., prob. juris. noted, 48 U.S.L.W. 3613 (U.S. March 24, 1980), this Court has agreed to review an identical challenge to this statute. Doe, Jurisdictional Statement at 2, 10.

It is well established that parents' relationship with their children is one of the liberties to which due process must be accorded. Quilloin v. Walcott, 434 U.S. 246, 255 (1978). Indeed, this Court repeatedly has struck down state attempts to violate the integrity of the family. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Moore v. East Cleveland, 431 U.S. 494 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). See also Duchesne v. Sugarman, 566 F. 2d 817 (2nd Cir. 1977). When the state seeks to regulate or curtail the parent-child relationship, it must do so under a standard evidencing "a greater degree of specificity

than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974).*

Delaware provision 13 Del. C. §1103(4) lacks that required degree of specificity. The statute, by providing no guidance as to what constitutes unfitness, forces courts, state officials and parents to guess at its meaning and breadth. It leaves the fact finder to determine from his own subjective values whether the parents have committed any misconduct. But cf. Giacco v. Pennsylvania, 382 U.S. 399 (1966).

TPR statutes employing essentially similar language have been held invalid by two federal courts. Thus, in Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976), the offending language authorized termination of parental rights of those whose homes were "unfit" and "improper." Recognizing the circular and opaque character of the statutory standard, the court held Alabama's TPR statute unconstitutionally vague. Similarly, the Iowa TPR statute, focusing on the terms "unfit" and "necessary parental care and protection," was invalidated in Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd on other grounds, 545 F. 2d 1137 (8th Cir. 1976) (per curiam).**

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* This Court has held that vagueness is not permissible solely because a statute was enacted for the protection of children. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689 (1968).

** In Alsager, the Court of Appeals admonished:

> "Both the vagueness and overbreadth attacks upon these provisions are serious ones. By declining to affirm on these grounds, however, we afford the Iowa courts an additional opportunity to give the statutory provisions a plainly desirable limiting construction." 545 F. 2d at 1138.

In addition to these federal court decisions, at least one state supreme court has invalidated language virtually identical to that upheld below. Davis v. Smith, 583 S.W. 2d 37 (Ark. 1979) ("parents . . . unable to provide a proper home").*

The findings made in relation to 13 Del. C. §1103(4) in this case illustrate the vices of vague statutes. Whether Appellants are "not fitted" so as to forfeit permanently their relationship with their children because their eighteen month old baby cannot walk or prefers a bottle or because their seven year old child throws food (A. 2b) are issues over which men of ordinary intelligence can argue interminably. Moreover, reasonable men would not unanimously conclude that Appellants' "dependency" on others allows the state to intervene into their family. Indeed, in the trial judge's first opinion he realized that in making the "unfitness" determination he had to rely upon his own background and a subjective opinion. A. 2b.**

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* The statutory language of TPR statutes has not escaped scholarly criticism. See e.g., Note, The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings, 68 Geo. L. J. 213 (1980); Due Process and the Fundamental Right to Family Integrity: A Re-evaluation of South Dakota's Parental Termination Statute, 24 So. Dak. L. R. 447 (1979); Day, Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale, 16 J. Fam. L. 213 (1977-78).

** The effects of such indeterminate statutory grounds are greatly accentuated when the state's burden is merely to pursuade the fact finder of his subjective wisdom by a preponderance of the evidence. See In Re Five Minor Children, supra.

The Delaware statute's extraordinary vagueness, the precious quality of the family relationships terminated by the statutory remedy, and the underlying conflict on this precise issue between Delaware and the Federal courts all demonstrate that this appeal presents a substantial question warranting plenary review.

Since their vagueness challenge is presently pending before this Court in Doe v. Delaware, supra, Appellants request that the Court grant review in their appeal and defer disposition until a decision on the constitutionality of 13 Del. C. §1103(4) is rendered in Doe. A decision in Doe concerning the Delaware TPR statute will be dispositive of the issue here presented.

CONCLUSION

For the reasons stated, and because the Court noted probable jurisdiction in Doe v. Delaware, supra, an appeal which involves the identical question, the Court should note probable jurisdiction.

Respectfully Submitted:

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April 3, 1980